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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 516

MALCOLM LEBERT PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 71–76; Pet. App. 1–7) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1962 (R. 71, 77; Pet. App. 1, 8). A petition for rehearing was denied on September 14, 1962 (R. 78; Pet. App. 9). The petition for a writ of certiorari was filed on October 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Most of the issues raised in this petition are also raised in No. 515, this Term. Since the major opinion of the court of appeals was written in this case, we discuss the common issues here and deal in No. 515 only with the issues which are confined to that case.

QUESTIONS PRESENTED

1. Whether there was a basis in fact for petitioner's classification in selective service class 1-A-O (noncombatant service).

2. Whether various rulings by the trial judges were proper.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged that the petitioner, on September 14, 1960, willfully refused to submit to induction into the armed forces of the United States, in violation of 50 U.S.C. App. 462 (R. 2–3). After a jury trial in September 1961, petitioner was convicted and sentenced to imprisonment for two years and fined $1,000 (R. 2, 4, 63, 64, 66–67). The conviction was affirmed on appeal (R. 71–76, 77; Pet. App. 1–7, 8).

The pertinent facts may be summarized as follows:

1. Petitioner is a member of the Harshmanite Church of Sullivan, Illinois, which opposes military training and service. In 1955, petitioner registered for the draft with Local Board No. 177 in Sullivan, Illinois. He subsequently filed a special form for conscientious objectors in which he stated that, because of his religious beliefs, he was conscientiously opposed to participation in war in any form, including noncombatant training and service (R. 31; G. Ex. B–2).[1] Petitioner stated that from about May 1954 he had worked for Community Industries, a business enter-

[1] We have lodged with the Clerk of this Court the Selective Service file of the petitioner which was an exhibit at the trial. This will be referred to as "G. Ex. B," and the appropriate document therein will be referred to by number.

prise established by the Harshmanites, the chief purpose of which is to provide employment for its members (G. Ex. B–1). In October 1955, the local board classified him 1–A–O, *i.e.*, eligible for non-combatant service (G. Ex B–1). After the petitioner had made a personal appearance before the local board in support of his claim that he was entitled to a 1–O classification (exempt from non-combatant and combatant military training and service), the board again classified him 1–A–O (Gov. Exs. B–1, B–3, B–8, B–9, B–12, B–15). Petitioner then appealed his classification to the Illinois Selective Service Appeal Board (G. Ex. B–10.) In a letter to the Appeal Board, petitioner alleged that one member of the local board had told him that they would not give anyone a 1–O classification (G. Ex. B–12).

Pursuant to Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)), the Department of Justice investigated petitioner's case for the purpose of making a recommendation to the State Appeal Board. After a hearing before a departmental hearing officer, at which the petitioner and four others appeared, the Department of Justice, in June 1957, recommended that petitioner be classified 1–A–O (G. Ex. B–16). The Department reported that the hearing officer had been impressed with petitioner's truthfulness and frankness. It then recited (G. Ex. B–16):

> The registrant explained that although Community Industries does not manufacture munitions in the ordinary sense of the word they do manufacture other items for military consump-

tion such as tents, WAC uniforms, candy for army rations and some sort of valve used on Naval vessels and other items. He said that it would not be considered immoral or a violation of their Christian duty to manufacture ammunition and that their reluctance to manufacture munitions is not a matter of religious beliefs but merely a matter of preference. The registrant concluded by verifying that all of the above beliefs and opinions of the Harshmanites, in general, are also his own personal beliefs and opinions.

The Department reported its opinion that petitioner had failed to sustain his claim with regard to non-combatant service. A copy of the Departmental recommendation was sent to the petitioner (R. 47, 49).

In a letter to the Appeal Board of July 30, 1957, petitioner disputed a statement in the report that his objection to service was based on the Commandment not to kill, asserting that his beliefs were based on the New Testament direction to love one's enemies. He said that in the non-combatant service he would be under a force whose main purpose is killing. He said that during the war the members of the church were given 4E (equivalent to 1-O classifications) and "at that time they were manufacturing war goods." He said that "[t]he goods that we manufactured for use in the Army or Navy could be used by civilians too. The goods that we manufacture is not directly involved in killing and fighting" (G. Ex. B-17). In December 1957, the Appeal Board classified the petitioner 1-A-O (G. Ex. B-1, B-15).

On May 11, 1960, the local board reopened and considered anew petitioner's classification. It reclassified him 1-A-O (G. Ex. B-1; see G. Ex. B-24). Petitioner did not request a personal appearance before the board, nor did he appeal the classification.

The local board subsequently ordered petitioner to report for induction into the armed forces on September 14, 1960 (G. Ex. B-26). Petitioner reported at the induction center but refused to submit to induction on the ground that his religious beliefs would not permit him to do so (R. 12-13, 15-16, 38-40; G. Exs. B-1, B-28).

2. At the trial, petitioner's Selective Service file was introduced into evidence. Petitioner testified as to the contents of certain documents in that file and one such document was read to the jury by petitioner's counsel (R. 8, 31-37). The court refused to order the production by the government of a copy of the hearing officer's report, which was not included in petitioner's Selective Service file (R. 10). The court refused to allow the petitioner to offer proof at the trial that the Community Industries never directly or indirectly manufactured any "war material"; that a witness heard a local board member say that no one would receive a 1-O classification; that certain statements in the recommendation of the Department of Justice to the Appeal Board were untruthful; and that petitioner had certain religious beliefs which he communicated to the local board (R. 27-29, 40-47).

The court, which had previously ruled that there was a basis in fact for petitioner's classification (R. 17, 18), denied motions for judgment of acquittal (R.

18, 50). After conviction a motion for new trial on the ground that the verdict was against the law and the weight of the evidence was also denied (R. 63–64).

ARGUMENT

The fundamental error which underlies most of the contentions made by petitioner is his apparent assumption that, at his trial for refusal to submit for induction, it was the function of the jury to determine whether petitioner was entitled to a 1–O classification. It is established that this is not the function of the jury at all; it is not even the function of the trial judge. At the criminal trial, the trial judge does have a duty to determine, on the administrative record, whether there was a basis in fact for the classification given. If such basis in fact is found to exist, the determination of the Selective Service system must be accepted. See *Estep* v. *United States*, 327 U.S. 114, 122–123; *Cox* v. *United States*, 332 U.S. 442.

As this Court pointed out in *Witmer* v. *United States*, 348 U.S. 375, 380–381:

> It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States*, 346 U.S. 389, 396 (1953). The classification can be overturned only if it has "no basis in fact." *Estep* v. *United States*, 327 U.S. 114, 122 (1946).

When petitioner's arguments are examined in the light of these principles, it becomes clear that the

only question which this case really presents is whether there was basis in fact for the 1-A-O classification, *i.e.*, for concluding that petitioner was not actually conscientiously opposed to non-combatant service. Under the standard of the *Witmer* case there was.

1. The basis in fact for petitioner's I-A-O classification was his admission before the Departmental hearing officer that Community Industries for which he worked manufactured tents, WAC uniforms, candy for army rations and valves for naval vessels; that the Harshmanites did not consider that the manufacture of munitions would violate their Christian duty; that the reluctance of the Harshmanites to manufacture munitions was not a matter of religious belief but a matter of preference; and that he subscribed to those beliefs and opinions of the Harshmanites (G. Ex. B-16). Petitioner did not challenge these admissions at any time during the remainder of the administrative proceedings. Indeed, in his letter to the Appeal Board of July 1957—after he had received a copy of the Departmental recommendation—he said that the "goods that we manufactured for use in the Army or Navy could be used by civilians too" (G. Ex. B-17). Whether in fact Community Industries did or did not manufacture valves for naval vessels or other items mentioned is not significant. What is significant is the nature of petitioner's beliefs as reflected in his own interpretation of the position of his sect. Since petitioner's expression of a personal belief showed a willingness to produce goods directly related to the conduct of a war, there was

basis in fact for the I–A–O classification. See *White* v. *United States*, 215 F. 2d 782, 786 (C.A. 9), certiorari denied, 348 U.S. 970; *Blalock* v. *United States*, 247 F. 2d 615, 619 (C.A. 4); *Meredith* v. *United States*, 247 F. 2d 622, 623 (C.A. 4); *Jones* v. *United States*, 241 F. 2d 704, 705–706 (C.A. 4); *United States* v. *Van Hook*, 284 F. 2d 489 (C.A. 7), reversed and remanded for resentencing, 365 U.S. 609; *United States* v. *Moore*, 217 F. 2d 428, 434–435 (C.A. 7), reversed on other grounds, 348 U.S. 966. It was for the Board to consider the persuasiveness of petitioner's explanation that, although he was not conscientiously opposed to war-connected activity, he was conscientiously opposed to being part of a military organization.

2. In the light of the nature of the issues at the trial, as discussed above, petitioner's objections to various rulings at the trial (Pet. 29–33) are without merit.

a. The trial court properly refused to allow the petitioner to introduce evidence bearing upon his classification or to challenge the Departmental recommendation to the Appeal Board (see Pet. 28–29). See Statement, *supra* p. 5. The only relevant question bearing upon petitioner's classification at the trial was whether there was a basis in fact for that classification, a question for the court to determine on the basis of petitioner's Selective Service file. *Cox* v. *United States*, 332 U.S. 442. Petitioner had ample opportunity in the administrative proceedings to challenge the Departmental recommendation or to have lodged in his file any material deemed necessary in support of his claim.

b. There is no merit to petitioner's contention (Pet. 25–27) that the local board was prejudiced against him because a board member in September 1956 allegedly told him that the board would not classify anyone in class 1–O, and that this prejudice tainted the entire classification proceedings in the case. Not only was there a classification *de novo* by the appeal board[3] but petitioner's classification was considered anew in May 1960. The classification upon which petitioner was ordered to report and submit to induction was the result of the new proceedings in May 1960—three and one-half years after the alleged incident giving rise to the claim of prejudice—and was by a board panel which did not include the gentleman (Mr. Bone) who allegedly made the prejudicial statement (G. Ex. B–1).[4] Whether the local board in September 1956 applied proper standards, therefore, is immaterial. See *Goetz* v. *United States*, 216 F. 2d 270, 272 (C.A. 9); *United States* v. *Hartman*, 209 F. 2d 366, 368 (C.A. 2); *Evans* v. *United States*, 252 F. 2d 509, 511 (C.A. 9); *United States* v. *Moore*, *supra*, 217 F. 2d at 433–434; *Tyrrell* v. *United States*, 200 F. 2d 8, 11 (C.A. 9), certiorari denied, 345 U.S. 910; *United States* v. *Chodorski*, 240 F. 2d 590, 591 (C.A. 7), certiorari denied, 353 U.S. 950; *Reed* v. *United States*, 205 F. 2d 216, 218 (C.A. 9), certiorari denied, 346 U.S. 908.

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[3] See in this connection the record in No. 515.

[4] Petitioner's classification in September 1956 was by a board vote of 4–0, and was initialed by board members as follows: "EWM", "JAS", "HLB", and "DLW" (G. Ex. B–1). Petitioner's classification in May 1960 was by a board vote of 3–0, and was initialed by board members as follows: "JAS", "PLS" and "DDH" (G. Ex. B–1).

c. At the trial, petitioner's Selective Service file was introduced into evidence. Thereafter, petitioner testified as to the contents of certain documents contained in that file, and counsel for the petitioner read to the jury one document (R. 31–32, 35). The court indicated that it intended to send all of the exhibits in the case to the jury for their examination (R. 33). Petitioner objected to this ruling on the ground that government counsel had indicated that some of the documents contained in that file were hearsay (*i.e.*, the report of the statement by Bone (R. 24, 33)). No objection was made, however, when the file was sent to the jury (see R. 63). Petitioner contends (Pet. 29–31) that error was committed in sending the file to the jury, and that he was somehow prejudiced by that action although the court instructed the jury that they were not to consider the question of his classification.

While it was technically incorrect to send the file to the jury since there was nothing in the file which bore upon the jury's function of determining whether the petitioner had willfully refused to submit to induction, the error was harmless. The jury was instructed that the court had found a basis in fact for petitioner's classification; that the classification had been made in accordance with the regulations and the law; that the jury was not to concern itself with petitioner's classification "because under the law that is not an issue which the jury is authorized to determine"; and that they were to determine whether the petitioner willfully failed to submit to induction into the armed forces (R. 52–56).

d. The district court properly denied petitioner's request for production of the hearing officer's report at the trial (R. 8, 10). *Gonzales* v. *United States*, 364 U.S. 59, 63. In that case, this Court held that there was nothing in the Universal Military Training and Service Act which required production of the hearing officer's report, which was merely intra-departmental and did not constitute the recommendation of the Department of Justice. The Court went on to say (*Id.* at 64):

> * * * In addition, petitioner has failed to show any particular need for the report and notes. While there are now allegations of the withholding of "favorable evidence developed at the hearing" and a denial of a "full and fair hearing," no such claim was made by petitioner at any stage of the administrative process. Moreover, his testimony at trial never developed any such facts. In the light of these circumstances, as well as the fact that the issue at trial in this respect centered entirely on the Department's recommendation, which petitioner repudiated but which both the appeal board and the courts below found supported by the record, we find no relevancy in the hearing officer's report and notes.

Petitioner seeks to bring himself within the quoted language by arguing (Pet. 31–33) that he challenged the "fairness" of the Departmental hearing throughout the administrative process, and that he challenged the hearing officer's report before the Appeal Board and the trial court. In his letter to the Appeal Board, petitioner challenged the accuracy only of the statement that his reason for non-acceptance of the

I-A-O classification was the Commandment, "Thou shalt not kill", stating that he based his attitude on the teachings of the New Testament (G. Ex. B-17). This was emphasized when petitioner read that particular exhibit in his Selective Service file to the jury (R. 35). The sincerity of petitioner's opposition to combat was, however, never at issue in the administrative proceedings. The important fact is that petitioner, in his letter to the Appeal Board, did not challenge the accuracy of petitioner's statements as to the willingness to manufacture goods for war, although, manifestly, he knew of his right to refutation of the Department's report. Having thus failed to make the challenge at the administrative hearing, he could not do so at the trial.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1962.

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No. 516

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

MALCOLM LEBERT PARKER,
Petitioner;

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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